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No. 05-705

IN THE
Supreme Court of the United States

GLOBAL CROSSING TELECOMMUNICATIONS, INC.,
Petitioner,

v.

METROPHONES TELECOMMUNICATIONS, INC.,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

It is for Congress, and just for Congress, not only to create federal causes of action but also to specify their scope. In sections 206 and 207 of the Communications Act, 47 U.S.C. §§ 206, 207, Congress expressly limited private causes of action to those alleging violations of the Act's *statutory* provisions. Unlike numerous other private-cause-of-action provisions – both inside and outside the Communications Act – Congress declined to provide for the judicial enforcement of regulations. Respondent nevertheless insists on a right to bring an action alleging violations of duties "the Federal Communications Commission (FCC) has lawfully imposed on common carriers, *by regulation*." Resp. Br. 1 (emphasis added). It claims the right to do so based on its assertion that failing to abide by a regulation is necessarily "unjust and unreasonable" in violation of subsection (b) of the Communications Act's organic statute, 47 U.S.C. § 201.

Accepting Respondent's argument would obliterate the commonsense distinction between statutes and regulations, and thus would permit plaintiffs to bring federal damages lawsuits that Congress has neither allowed nor envisioned. While this Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), held that enforcing regulations that merely "apply[]" or "construe" a statute is no different than enforcing the statute itself, that rule does not extend to regulations that implement an open-ended statutory directive to create a regulatory regime. *Id.* at 284-85, 293 n.8. The FCC's payphone compensation regulations plainly fall into the latter category. They impose monetary obligations on Petitioner that would not otherwise exist. Accordingly, the only way to respect Congress' choice to limit federal lawsuits brought under sections 206 and 207 to those arising from violations of the statutory scheme itself is to

hold that section 201(b) does not automatically transform every regulatory violation into a statutory violation.

ARGUMENT

A. The Payphone Compensation Regulations Are Not Enforceable Through The Communications Act's Private Cause Of Action Provision To The Extent That They Create Obligations That The Act Itself Does Not Impose.

Despite the straw man Respondent props up to open its argument (Resp. Br. 16; *see also* U.S. Br. 10), Petitioner is fully aware that this is not an implied-right-of-action case. *See, e.g.*, Petr. Br. 9, 13. Congress has provided in sections 206 and 207 of the Act that violations of "this chapter" are enforceable in federal damages suits.

But the mere existence of an express cause of action for statutory violations does not – as Respondent and the FCC would have it – render *Alexander v. Sandoval* inapplicable and make this simply a run-of-the-mill *Chevron* case. The plain text of sections 206 and 207 limits causes of action to claims asserting violations of the Act itself. Those provisions thus stand in stark contrast to provisions elsewhere in the Act and in numerous other statutory schemes that allow private parties to bring federal damages lawsuits for violations of statutes "or regulations." *See* Petr. Br. 12-15 (collecting examples). There must be some meaningful difference between these two types of provisions; it is a fundamental canon of statutory interpretation that when Congress uses different phrases in similar contexts, those phrases have different meanings. *See* 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46:06, at 194 (6th ed. 2000). And the statutory term "or regulations" should not be treated as surplusage. *E.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (surplusage canon).

As several federal courts of appeals already have recognized, there is a straightforward way to make sense of the difference between cause-of-action provisions that allow private enforcement only of statutory violations and those that allow private enforcement of statutory *or regulatory* violations: The former limit actions to those asserting violations of express statutory provisions in the same way that *Sandoval* limits actions in the implied-cause-of-action context, whereas the latter are not subject to a *Sandoval*-equivalent restriction. *See Iverson v. City of Boston*, 452 F.3d 94, 99-101 (1st Cir. 2006); *Ability Ctr. v. City of Sandusky*, 385 F.3d 901, 913-15 (6th Cir. 2004).[1] Indeed, the impermissibility of basing a cause of action on a mere regulatory prohibition – or, *a fortiori*, any other agency proclamation that goes beyond an express statutory prohibition – is even clearer here than it was in *Sandoval* itself. In contrast to the judicial guesswork that the implied cause of action there required, Congress has *expressly* dictated in sections 206 and 207 that a cause of action exists only for statutory violations. *See* Petr. Br. 19.

In short, this case does not turn on the *Chevron* question whether the FCC's payphone compensation regulations – or, much less, its pronouncement that violations of the regulations violate section 201(b) – is authoritative and reasonable. *See* Resp. Br. 17; U.S. Br. at i. That inquiry would merely test the

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[1] Following *Sandoval*, every court of appeals to address the issue also has held that the private cause of action contained in 42 U.S.C. § 1983, which provides for the private enforcement of the "laws" of the United States, does not allow damages lawsuits to enforce mere regulations. *See Johnson v. City of Detroit*, 446 F.3d 614, 628-29 (6th Cir. 2006); *Save Our Valley v. Sound Transit*, 335 F.3d 932, 943 (9th Cir. 2003); *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Protection*, 274 F.3d 771, 790 (3d Cir. 2001). These decisions go even farther than this Court needs to go here because there is potential ambiguity in the word "laws" that is not present in Congress' express limitation in sections 206 and 207 to statutory violations. There can be no doubt, however, that accepting Respondent's argument that the mere existence of an express cause of action renders *Sandoval* inapplicable would abrogate those holdings respecting § 1983 as well.

legality of the regulations or the *2003 Payphone Order*'s proffered use of section 201(b). In order to assess whether a private cause of action exists to seek damages in federal court based on violations of the FCC's regulations, the question, as the First Circuit has put it in the context of an analogous cause-of-action controversy, is the same as in *Sandoval*: whether the agency pronouncements "simply effectuate[] an express mandate contained in the organic statute" or whether they "announce[] an obligation or a prohibition not imposed by the organic statute." *Iverson*, 452 F.3d at 101 (citing *Sandoval*, 532 U.S. at 284-85); *see also* Petr. Br. 20-21. If they do the latter, they may not be privately enforced through sections 206 and 207's cause of action to claim damages based on *statutory* violations.

B. Section 201(b) Does Not Require A Long Distance Carrier To Compensate Payphone Service Providers For Dial-Around Calls As Directed By The FCC's Regulations.

Once this case is returned to its proper framework, the outcome is clear: Violations of the payphone compensation regulations cannot give rise to a private cause of action because those regulations create obligations that section 201(b) does not impose itself. And nothing about the FCC's pronouncement in the *2003 Payphone Order* that violations of the regulations also violate section 201(b) can alter that reality.

1. Respondent virtually concedes that it cannot prevail on its section 201(b) claim in a *Sandoval*-equivalent regime when it acknowledges that "nothing in the statutory language requires th[e] approach" embodied in the FCC's payphone compensation regime (Resp. Br. 21), and emphasizes over and over that the FCC has "imposed on common carriers, *by regulation*, the obligation to pay PSPs for the 'dial-around' calls at issue in this case." *Id.* at 1 (emphasis added); *see also id.* at 7, 11, 14, 15, 41. And not just by any regulations – by

regulations imposed pursuant to a *different* section of the Act: section 276. Put another way, the only reason long distance carriers have to pay payphone service providers with respect to dial-around calls – and pay a particular amount, at that – is because *the FCC* – acting pursuant to a different statute than Respondent invokes here – has decreed that long distance carriers should have to do so. Absolutely nothing in section 201(b) itself requires such payments.

Respondent nevertheless complains that it is inherently unfair for long distance carriers to fail to pay their "debts" to payphone service providers. Resp. Br. 14, 39. But what is fatal to Respondent's position is that absent the FCC's *regulatory* construct under which long distance carriers are supposed to pay payphone service providers and then recoup their expenses from the callers, long distance carriers would have *no* alleged debts to payphone service providers in the first place. Payphone service providers' only plausible source of recovery for the service at issue here would be to go directly after *callers*, who are the ones that have availed themselves of access to payphone services without payment.[2]

The FCC raises two other objections to this straightforward analysis. First, it argues that the analysis would render section 201(b) "an essentially useless irrelevancy" because it would require the specific practice at issue to be expressly mentioned in that section, and the section's general prohibition does not expressly mention any practices. U.S. Br. at 22-24. But this

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[2] The FCC suggests at one point that long distance carriers might owe money to payphone service providers in the context of coinless calls even in the absence of the payphone compensation regulations because carriers "could" pay a commission to payphone service providers with respect to such calls. U.S. Br. 29. But Respondent does not claim any such entitlement; just because long distance carriers might choose to pay commissions with respect to coinless calls does not mean it would be unjust or unreasonable them not to do so. Indeed, Respondent concedes as much by explaining that "the PSP . . . provides a service to *the caller*, for which [it] is supposed to be compensated." Resp. Br. 21 (emphasis added).

argument mischaracterizes Petitioner's position. The problem here with portraying violations of the payphone compensation regulations as violations of section 201(b) is not simply that section 201(b) fails to mention payphone compensation; it is that another section (276) expressly does – in great detail. And that section conspicuously declines to impose the obligation that Respondent seeks to enforce here. *See* Petr. Br. 22-26. Where no more specific section of the Act covers the practice at issue – for example, in the context of "charging customers for rejected collect calls," U.S. Br. 24 – and where the "practice" at issue otherwise comes within the ambit of section 201(b), that section may well give rise to a private cause of action.

The truth of the matter is not that Petitioner's position would render section 201(b) a "useless irrelevancy" but rather that Respondent's and the FCC's position would, as the D.C. Circuit has recognized, "convert[] any common carrier's violation of a Commission order or regulation into a violation of the Act actionable in federal court." *APCC Servs. Inc. v. Sprint Communications Co.*, 418 F.3d 1238, 1247 (D.C. Cir. 2005) (per curiam), *petition for cert. filed*, 74 U.S.L.W. 3371 (U.S. Dec. 12, 2005) (No. 05-766). Respondent does not deny this fact. Rather, it says that Petitioner's alleged failures to pay it violate section 201(b) because payphone service providers' ability to recover compensation for coinless calls "is integral to the proper functioning of the payphone regulatory regime." Resp. Br. 11. This is pure bootstrapping. If violating a regulation that is "integral to the proper functioning of a regulatory regime" violates section 201(b), then a common carrier's violation of *any* regulation transgresses section 201(b). Presumably all of the FCC's regulations are integral to the proper functioning of a regulatory regime; that is why the FCC enacted them.

Second, while Respondent acknowledges that "[r]egulation of dial-around services could *just as easily* have developed in a

manner that allowed PSPs to collect money" directly from callers (Resp. Br. 21 (emphasis added)), the FCC takes a different tack, arguing that the Act itself actually "is most reasonably understood to suggest" that long distance carriers should be the ones to pay payphone service providers for coinless calls because section 226 prohibits requiring consumers to pay for such calls. U.S. Br. 22; *see also id.* at 15. As an initial matter, however, "suggest[ing]" a certain obligation is not the same as expressly mandating it, which is what is required to give rise to a private cause of action. *See, supra*, pp. 2-4.

But even putting that problem aside, the FCC's reading of section 226 – which it has never before advanced in any forum – is incorrect. All that section prohibits is requiring "*advance* payment by customers." 47 U.S.C. § 226(e)(2) (emphasis added). As the FCC previously recognized, this limited prohibition hardly precludes a "caller pays" approach. The FCC remains free to adopt – and actually considered adopting – a "third party billing" approach, under which long distance carriers would bill customers after-the-fact on behalf of payphone service providers. *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 F.C.C.R. 20,541, 20,580-81 ¶¶ 77, 79 (1996) (considering "'set use fee' system, where the toll-carrier would bill and collect from the end user and then remit payment to the PSP"); *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 F.C.C.R. 21,233, 21,272 ¶ 79, 21,275 ¶ 88 (1996) (same). The FCC also could have adopted a plan requiring callers to bill the cost of payphone access for coinless calls to their home phone, a credit card, or other later-billing device. *See* 1996 Report and Order, *supra*, at 20,582-83 ¶ 80 (considering "'caller pays' compensation system" by "billing the charge to a credit card or calling card").

There simply is no escaping that the FCC, not Congress, imposed the duties Respondent seeks to enforce here. This fact dooms Respondent's attempt to bring this cause of action in federal court.

2. Even if all the FCC's pronouncements could be incorporated into this Court's section 201(b) analysis, and all those pronouncements had to do for Respondent's private cause of action to be valid was pass the *Chevron* authoritativeness and reasonableness test, Respondent's claim would still fail. Although Respondent strains mightily to show that the FCC's statement in the *2003 Payphone Order* that payphone service providers may seek damages in federal court for violations of the payphone compensation regulations (a) is eligible for deference and (b) a reasonable construction of 201(b), Respondent falters on both counts.

a. Respondent contends that the FCC's pronouncement that its regulations are enforceable through a private cause of action does not run afoul of this Court's decision in *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), because (i) "Congress, not the FCC, created the express right of action" at issue here and (ii) the FCC's pronouncement was really a substantive construction of section 201(b) that did nothing more than have "implications" for that right of action. Resp. Br. 30-31; *accord* U.S. Br. 19-20. But Respondent's first point does nothing to distinguish this case from *Adams Fruit*. There, just as here, Congress had expressly provided the underlying right of action at issue. *Adams Fruit*, 494 U.S. at 641.

Respondent's second point simply flouts reality. As Respondent itself notes, the FCC's focus in the *2003 Payphone Order* was "whether PSPs have access to *adequate avenues of relief* in instances where [its] PSP compensation rules are violated." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Further Notice of Proposed

Rulemaking, 18 F.C.C.R. 11,003, 11,012 ¶19 (2003) (emphasis added); *see* Resp. Br. 13 ("The *2003 Payphone Order* resulted from a notice-and-comment rulemaking that focused on whether PSPs have adequate means to collect compensation from IXCs."); U.S. Br. 20 (FCC's statement in the *2003 Payphone Order* reflected effort "to ensure that PSPs are able to collect the money they are owed"). In other words, the FCC was opining on remedies, not rights. And, it opined, contrary to the language of sections 206 and 207, that violations of regulations could give rise to damages actions in federal court.

While the FCC is perfectly free to consider the availability of payphone service providers' remedies in administering its regulatory regime, *Adams Fruit* provides that it is "inappropriate" to defer to an agency concerning the extent of a "judicially enforceable remedy." 494 U.S. at 650; *see also Kelley v. Environmental Protection Agency*, 15 F.3d 1100, 1107-08 (D.C. Cir. 1994). And despite Respondent's suggestions to the contrary (Resp Br. 5, 6-7), it should go without saying that the same principle applies with respect to certain long distance carriers' submissions in past proceedings on that point. *See, e.g., Roberts v. Galen of Va.*, 525 U.S. 249, 253 (1999) (per curiam) ("the concession of a point on appeal by [a party] is by no means dispositive of a legal issue"). Indeed, while the D.C. Circuit initially accepted in passing those long distance carriers' submissions that a cause of action to enforce the payphone compensation regulations existed under sections 206 and 207, *American Pub. Communications Council v. FCC*, 215 F.3d 51, 56 (D.C. Cir. 2000), that court itself disavowed that legal proposition upon closer examination by holding in *APCC Services* that no such cause of action existed, 418 F.3d at 1247-48.

Even if Respondent could overcome *Adams Fruit*, its attempt to show that the FCC engaged in sufficient deliberation and explanation with respect to whether violations of the payphone

regulations violate section 201(b) would fail for a related reason. If the *2003 Payphone Order* had truly construed section 201(b), one would expect to find at least something substantively discussing why a long distance carrier not paying money to a payphone service provider for coinless calls is a "practice" that is "unjust and unreasonable." But one finds not one such word.[3] The FCC, to be sure, engaged in extensive deliberation concerning whether payphone service providers had remedial avenues to enforce the payphone compensation regulations. But it gave no notice and provided no explanation respecting whether or why violating these regulations violates section 201(b). That, of course, is what the D.C. Circuit meant when it stated – in a passage Respondent unjustly mocks (Br. 28 n.10) – that "the Commission did not attempt . . . to

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[3] Nor is there any such word in the FCC's orders following the Telephone Operator Consumer Services Improvement Act of 1990, codified at 47 U.S.C. § 226. Contrary to Respondent's suggestion (Br. 2-3), the FCC there did not rely on the portion of section 201(b) that proscribes "unjust and unreasonable" practices to require compensation for some coinless calls. Rather, the FCC simply cited section 201 – not any specific subpart or language of section 201 – in the "Ordering Clauses" section among a host of other statutes:

> Accordingly, IT IS ORDERED, that pursuant to authority contained in Sections 1, 4, 201-205, 218, 220, and 226 of the Communications Act of 1934, . . . that the policies, rules, and requirements set forth herein ARE ADOPTED.

Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Second Report and Order, 7 F.C.C.R. 3251, 3261 ¶ 66 (1992); *see also Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, Report and Order and Further Notice of Proposed Rulemaking, 6 F.C.C.R. 4736, 4749 ¶ 59 (1991) (same). The FCC undoubtedly cited section 201 for the proposition that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter," 47 U.S.C. § 201(b) – not in reference to that section's "unjust and unreasonable" language.

interpret § 201(b) to encompass violations of its [payphone compensation] rules." *APCC Servs.*, 418 F.3d at 1248.

Respondent tries to avoid this problem by objecting that (i) an agency's failure to provide reasoning for its decision does not preclude *Chevron* deference outside of direct review of agency action; and (ii) the FCC's *amicus* briefing is itself entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997). Resp. Br. 35-38. But neither of these arguments withstands scrutiny. First, there can be no doubt that the *ipse dixit* nature of an agency's assertion is relevant whenever a question respecting *Chevron* deference arises. Just last Term, this Court confirmed in a context much like this one – that is, in a private lawsuit that did not seek direct review of federal agency action – that "expressions of agency understandings" that do not "set out agency reasoning . . . do not command deference." *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 126 S. Ct. 1843, 1848 (2006).

Second, *Auer* simply cannot bear the weight Respondent places on it. In two later-decided cases, this Court has refused to defer to an agency explanation advanced in a brief, *United States v. Mead Corp.*, 533 U.S. 218, 228 n.19 (2001), and held unequivocally that agency assertions that lack "the force of law" – as briefs do – "do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). As Judge Posner has noted, "[p]robably there is little left of *Auer*." *Keys v. Barnhart*, 347 F.3d 990, 993 (7th Cir. 2003). But even if *Auer* were still good law, it would not help Respondent, for this Court gave credence to the agency's brief there only after emphasizing that the agency's position "is in no sense a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack." 519 U.S. at 912 (citation and alteration omitted); *see also America's Community Bankers v. FDIC*, 200 F.3d 822, 835 (D.C. Cir. 2000) ("In whatever context we defer to agencies, we do so with the understanding that the object of our deference is the

result of agency decision-making, and not some *post hoc* rationale developed as part of a litigation strategy.") (quotation marks omitted). That is exactly what we have here. Before appearing in this case and in the similar case in the D.C. Circuit, the FCC never offered any rationale as to why violating its payphone compensation regulations might constitute an unjust or unreasonable communications practice within the meaning of section 201(b). Consequently, it may not do so now.

b. Even if the FCC's assertion that violations of the payphone compensation regulations violate section 201(b) were eligible for deference, Respondent's argument that the FCC's assertion is "eminently reasonable" (Resp. Br. 38) would be unpersuasive. The most glaring deficiency in Respondent's argument is its inability to explain why it is reasonable to conclude that section 201(b), which is expressly limited to "interstate" and international communications, would cover communications that sometimes are wholly intrastate in nature.[4]

Respondent suggests that after some elaborate fact finding procedure it might be able to show that it is not feasible to separate interstate from intrastate coinless calls. Resp. Br. 24-27. But that suggestion is beside the point. The relevance of

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[4] Respondent's assertion (Br. 23-24) that this Court should ignore this argument because it was not specifically mentioned below is specious. "'Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). *Accord Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995); STERN ET AL., SUPREME COURT PRACTICE 421 (8th ed. 2002). Petitioner's jurisdictional mismatch point is not a new claim; rather, it simply supports Petitioner's argument that violating the payphone regulations does not constitute a violation of section 201(b).

section 276(b)(1)'s direction to ensure compensation for "intrastate" calls – with no concomitant legislation addressing the jurisdictional limitation in section 201(b) – shows that Congress simply did not anticipate that violations of the FCC's ensuing regulations would be an unjust or unreasonable communications practice.[5]

Both Respondent and the FCC try to salvage their positions by asserting that the "solution" to the jurisdictional mismatch problem is "to limit the reach of the Section 206 damages action based on Section 201(b) to interstate calls only." Resp. Br. 27; *accord* U.S. Br. 30 n.8. But this would be the height of arbitrariness. There is no reason why failing to pay with respect to interstate calls should give rise to a federal damages action but that failing to pay with respect to intrastate calls should not. The way to avoid this absurd result – as this Court should strive to do, *Clinton v. City of New York*, 524 U.S. 417, 429 (1998) – is to recognize that failing to abide by the FCC's regulatory regime simply does not amount to an unjust or unreasonable practice.

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[5] Respondent's legal position underpinning its feasibility argument is, in any event, wrong. The FCC has never extended federal authority over jurisdictionally mixed communications involving more than a *de minimis* interstate component to "switched" calls like the ones at issue here. This is because one can determine whether "switched" calls are inter or intra state simply by looking at the origin of the call and the phone number dialed. *See, e.g., Regulation of Prepaid Calling Card Services*, Declaratory Ruling and Report and Order, FCC 06-79, ¶ 32 (June 30, 2006) (endorsing direct calculations or percentage of interstate use reporting to allocate traffic between interstate and intrastate jurisdictions); *The Time Machine, Inc.*, Memorandum Opinion and Order, 11 F.C.C.R. 1186, 1190-91 ¶¶ 29-31, 1192 ¶ 38 (1995) (recognizing ability to allocate calling card (*i.e.*, switched) traffic between inter and intrastate jurisdictions). Contrary to Respondent's suggestion (Br. 26) that Global Crossing stated otherwise in administrative proceedings, Global Crossing's comments explained the difficulty in determining *whether* certain calls are completed, not *where* a caller is calling – *e.g.*, inter or intra state. Comments of Global Crossing North America, Inc., *Implementation of the Pay Telephone Reclassification and Compensation Provisions*, CC Docket No. 96-128, at 2-8 (June 23, 2003).

Respondent also fails to persuade in arguing (Br. 18-22) that a long distance carrier's failure to pay a payphone service provider with respect to coinless calls may reasonably be considered a communications "practice" within the meaning of section 201(b). Respondent does not dispute that the Ninth Circuit was wrong in asserting that requiring a long distance carrier to pay a payphone service provider with respect to coinless calls relates to carrier-customer relationships – that is, to "furnish[ing] . . . communications service upon reasonable request therefor." 47 U.S.C. § 201(a). Nevertheless, Respondent contends that such payments (or nonpayments) are "practices" covered by section 201(b) for an entirely different reason than the one advanced by the Ninth Circuit: because they relate to the "second" clause of section 201(a) – the clause that deals with carrier-carrier relationships. But the plain text of the second clause belies Respondent's novel argument. That clause is triggered only when the FCC orders carriers to interconnect – in the words of the statute to "establish physical connections with other carriers," "to establish through routes" or "to establish and provide facilities and regulations for operating such routes." 47 U.S.C. § 201(a); *see also In re ITT World Communications Inc. v. Western Union Telegraph Co.*, Memorandum Opinion and Order, 87 F.C.C. 2d 684 ¶ 17 (1981) (citing *Bell Telephone Co. of Pa. v. FCC*, 503 F.2d 1250 (3d Cir. 1974)) (second clause applies to interconnection orders); PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW 280 (2d ed. 1999) (same); 2 HARVEY L. ZUCKMAN ET AL., MODERN COMMUNICATIONS LAW 552-53 (1999) (same).[6] None of those things is even plausibly

[6] The legislative history of the second clause confirms that it was meant to addresses the limited – and relatively outdated – problem of carriers refusing to interconnect with other carriers. "The second clause of Section 201(a) was added to the bill in response to a contemporaneous court ruling that had held that the common law duty of common carriers to interconnect was a contractual matter. The clause therefore lists a series of powers that this Commission was to have in that context." *In re Petition of the*

at issue here. The FCC is not directing Petitioner to establish any connections or facilities related to coinless calling. Accordingly, section 201(a)'s second clause does not apply to any of Petitioner's economic practices in that respect either.

Finally, Respondent and the FCC contend that foreclosing section 201(b) as a vessel through which the payphone compensation regulations may be enforced would "significantly inhibit, if not eliminate, the administrative complaint process in many cases" because "judicial and administrative remedies" under sections 206 and 207 are coextensive. U.S. Br. 24-25; *accord* Resp. Br. 7 n.3. This concern is overwrought. As suggested above, parties may bring administrative complaints (or complaints in federal court) under sections 206 and 207 with respect to various practices that are "unjust or unreasonable" on their own terms, independent of any regulatory duties. *See*, *supra*, p. 6. Furthermore, neither Respondent nor the FCC denies that provisions in the Act besides sections 206 and 207 may allow administrative procedures to address violations even of regulations that impose obligations beyond those contained in section 201(b) or any other of the Act's statutory provisions – especially when, as here, the provision giving rise to the regulations directs the FCC "to ensure" those obligations are enforced. 47 U.S.C. § 276(b)(1). *See* Petr. Br. 17-18; U.S. Br. 26 ("such a regime might be permissible").

As Respondent aptly reminds this Court, we are no longer in the "bygone world of Ma Bell"; the telecommunications industry has become extremely competitive and technologically complex. Resp. Br. 21. Litigation in this area can be equally sensitive and intricate. When federal district courts have tried to manage lawsuits like this one, the cases have tied them up in knots – lasting for years on end, and requiring the courts repeatedly to seek administrative

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Continental Telephone Co. of Va. for a Declaratory Ruling, Memorandum Opinion and Order, 4 F.C.C.R. 7737, 7749 ¶ 21 (1988).

assistance. *See* Br. of Sprint Communications Co. as *Amicus Curiae*, at 20-24. Now more than ever, if there is a proper forum in which to resolve disputes over the meaning and application of the Commission's regulations, it is the FCC.

C. Respondent's Claim Based On Section 276 Is Waived And, In Any Event, Lacks Merit.

In its final attempt to sustain the Ninth Circuit's judgment, Respondent advances a proposition that not even that court has been willing to swallow: that section 276 of the Act gives rise to a private cause of action to enforce the FCC's payphone compensation regulations. This claim is not properly before this Court. Even if it were, it would fail on the merits.

1. "In the ordinary course," this Court "[does] not decide questions neither raised nor resolved below." *Glover v. United States*, 531 U.S. 198, 205 (2001); *see also* STERN ET AL., SUPREME COURT PRACTICE 422 (8th ed. 2002). Although Respondent did not press its section 276 claim in the Ninth Circuit, *see* Petr. App. 9a n.4, it contends that it may now raise that claim because (a) it is nothing more than an alternate ground for affirmance, and (b) it is antecedent to the question presented. Resp. Br. 40-42. Neither assertion is correct.

a. Respondent's section 276 claim is not an alternate ground for affirmance; it is *an entirely different cause of action.* Respondent's proposed amended complaint – the subject of this appeal – alleged seven separate causes of action against Petitioner: (1) violations of section 276; (2) violations of section 201(b); (3) violations of section 407; (4) violations of section 416(c); (5) unjust enrichment under state law; (6) implied contract under state law; and (7) negligence under state law. J.A. 53-59. The district court dismissed Respondent's section 276 claim, and Respondent did not appeal that ruling to the Ninth Circuit. Accordingly, under basic rules of civil and appellate procedure, the district court's decision is final and that claim is over. *See, e.g., The Andersons, Inc. v. Consol,*

Inc., 348 F.3d 496, 504 (6th Cir. 2003); *Renda v. King*, 347 F.3d 550, 552 n.2 (3d Cir. 2003); *Fitts v. Federal Nat'l Mortg. Ass'n*, 236 F.3d 1, 3 n.2 (D.C. Cir. 2001). Respondent may no more resuscitate that claim than a plaintiff could renew an abandoned First Amendment claim in a lawsuit under 42 U.S.C. § 1983 that originally alleged violations of several different constitutional provisions.

Even if Respondent had not abandoned its section 276 claim, it would not be appropriate for this Court to address it. Respondent failed to raise the claim in its Brief in Opposition to Global Crossing's Petition for Certiorari. Under this Court's Rule 15.2, therefore, the claim "may be deemed waived." *Baldwin v. Reese*, 541 U.S. 27, 34 (2004) (quotation marks omitted); *see also S. Central Bell Tel. Co. v. Alabama*, 526 U.S. 160, 171 (1999) (refusing to consider respondent's argument that was not raised until merits briefing); *Roberts*, 525 U.S. at 253-54 (same). Metrophones' current counsel, when urging this Court to grant certiorari in *APCC Services, petition for cert. filed*, 74 U.S.L.W. 3371 (U.S. Dec. 12, 2005) (No. 05-766), recognized as much. In its reply brief, APCC urged the Court (unsuccessfully) to grant review and consolidate its petition with this case because doing so would give the Court "the opportunity . . . to construe the specific statutory provision (Section 276) in which Congress focused on the problem underlying both cases." Reply Br. in Support of Pet'n for Cert., at 10. The inference that section 276 – as a basis for bringing a cause of action – is not before this Court is even stronger now that the FCC's amicus brief does not address whether section 276 gives rise to any private cause of action.

b. The question whether a violation of the payphone regulations constitutes a violation of section 276, which, in turn, triggers sections 206 and 207, is not antecedent to the question presented here. To the contrary, it is a claim entirely separate from Respondent's section 201(b) claim. When it is

possible to consider the question presented in a case on the merits "without assuming" the answer to the newly-raised issue, the latter is not a predicate to the former. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 381 (1995). That is the case here. This court need not assume one way or the other whether section 276 gives rise to a private cause of action to seek damages for violations of the payphone compensation regulations to determine whether section 201(b) does so. The only relevant points with respect to section 276 are that it neither creates a freestanding cause of action nor requires any particular kind of compensation regime. *See* Petr. Br. 23. Those two points are self-evident from the face of the statute, and Respondent does not dispute them.

2. In any event, the D.C. and Ninth Circuits have correctly held that violating the payphone compensation regulations does not amount to violating section 276. *See Greene v. Sprint Communications Co.*, 340 F.3d 1047, 1050-51 (9th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004); *APCC Servs.*, 418 F.3d at 1246. Contrary to Respondent's assertion, the FCC payphone regulations do not "interpret," "apply," or, least of all, "fill in the details" left open in section 276. Resp. Br. 44-46. Rather, the regulations respond to Congress' command to create a self-contained regulatory regime. There is a fundamental difference between giving a contractor detailed building blueprints that permit some discretion – such as choosing paint colors – and simply directing someone to build a house and choose the location. Congress' dictate in section 276 obviously falls into the latter category. The payphone regulations, therefore, are just like the regulations in *Sandoval* that this Court assumed were a legitimate means of implementing a general directive, but could not themselves give rise to a private cause of action.

Respondent protests that "there is no reason to believe" that Congress would not have wanted regulations enacted pursuant to 276 to be enforced through the private cause of action set forth in sections 206 and 207. Resp. Br. 44. But in reality,

there is every reason to believe this. Congress traditionally has *explicitly* provided for judicial enforcement of regulations in the Communications Act and other statutory schemes when it wanted them so enforced. *See* Petr. Br. 13-14. It did not do so in sections 206 or 276. Respondent simply does not come to grips with the language of these sections or its jurisprudential implications.

Nor, contrary to Respondent's additional objection, does declining to find a cause of action through section 276 "curtail PSP's rights found elsewhere in the Act." Resp. Br. 44. To make the point one final time: private plaintiffs have never had any right to begin with under sections 206 and 207 to seek damages in federal court for violations of mere regulations. And nothing in the Act itself has ever required long distance providers to pay payphone service providers with respect to coinless calls. Even though the FCC had the power to impose such an obligation, the Commission's directive went far beyond what any statutory provision required. The obligation thus may be enforced, if at all, only administratively.

CONCLUSION

For the foregoing reasons, as well as those stated in Petitioner's opening brief, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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